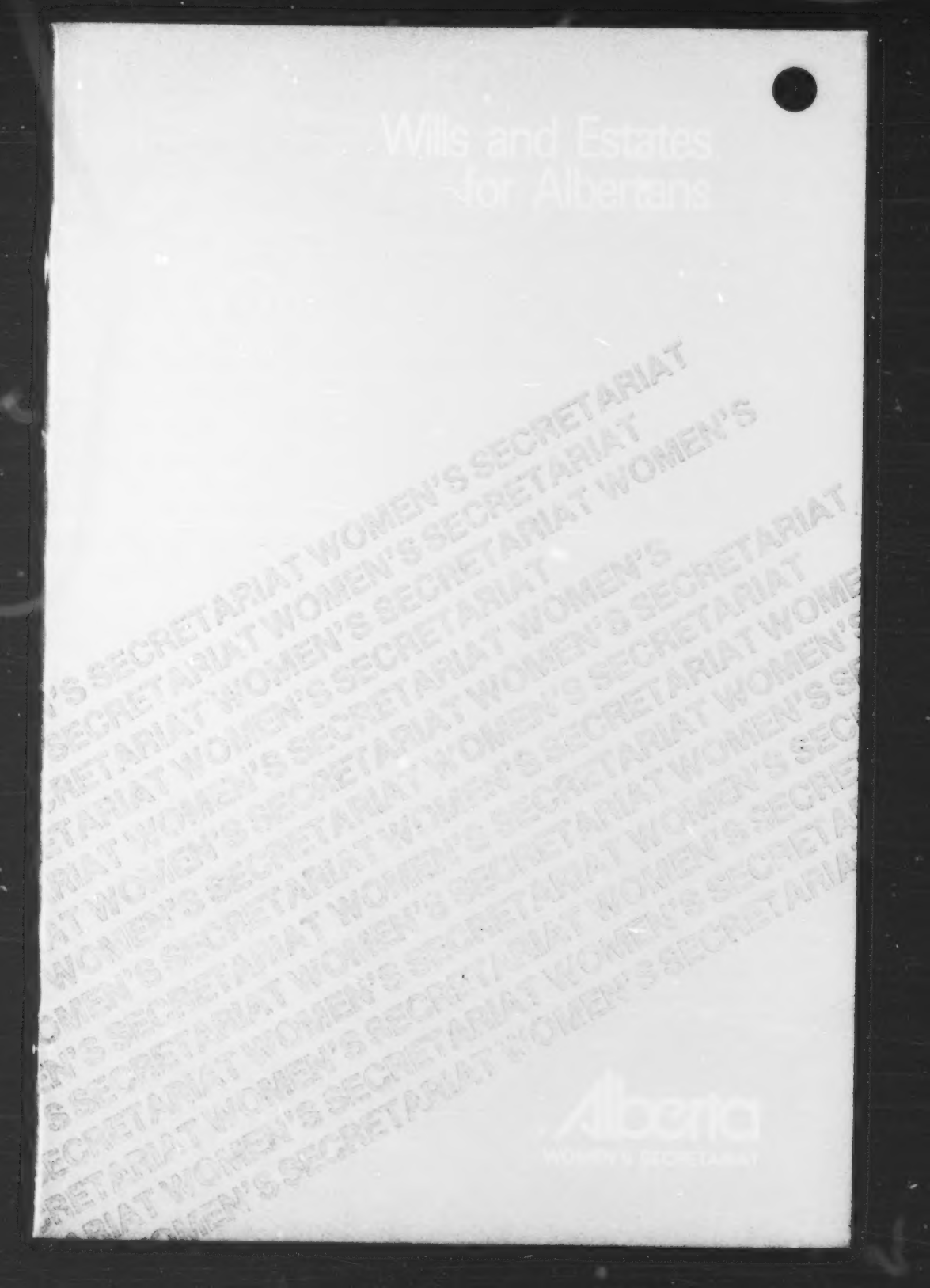
Wills and Estates for Albertans

WOMEN'S SECRETARIAT



88-02783/

wills and estates for Albertans

Individual copies available from:
ALBERTA WOMEN'S SECRETARIAT
8th Floor, Kensington Place
10011 - 109 Street
Edmonton, Alberta
T5J 3S8
Telephone 403/427-2470

Revised February, 1987

table of contents

	Page
Why Have a Will?	5
Who Can Make a Will?	5
Whom to See about Drawing up Your Will	5
Is a Will Permanent?	6
Where is a Will Kept?	6
What are the Types of Wills?	6
How the Will Disposes of Your Property	7
Ownership Transfer by Will	9
What Happens When a Person Dies Without a Will?	10
Executrixes and Administrators	11
What is the Relevant Legislation?	12
The Public Trustee	15
Guardians	16
Family Choices	19
Your Personal Record and Estate Guide	23

why have a will?

A will is a document in which a person records her wishes concerning the disposition of her property after death. If the will is properly drawn up, she is assured that her estate is settled according to her wishes with a minimum of expense and delay. It also allows her to choose a person she trusts to act as executrix of the will to take care of such matters as protecting her assets, paying the debts of the estate, and distributing the estate according to the provisions of the will.

If a person dies intestate, that is, without a will, her survivors may have to contend with difficulties such as lengthy court litigation and unnecessary death costs to the estate. Furthermore, if there is no will stating how the property is to be distributed after the testator's death, then the law must intervene and allocate her possessions according to **The Intestate Succession Act,** a strict formula, which can produce results that may bear no resemblance to the deceased's personal intentions.

who can make a will?

Any mentally competent person over 18 may make a will, but there are certain circumstances in which a person under 18 may also make a will.

whom to see
about drawing up your will

A lawyer is best qualified to draw up your will because she is familiar with the laws relating to wills and the transmission of property and can

provide the advice and the proper wording to assist you with the preparation of a will that disposes of your property in exactly the way you wish.

Legal fees for this service vary, depending on the complexity of the will. The matter of fees may be discussed with your lawyer in advance.

is a will permanent?

No. A will can be changed or revoked. It can be changed either by making a completely new will or by making a codicil (a supplement or an addition to a will; it will explain, modify, add to, subtract from, qualify, alter or revoke provisions in the will. ***Black's Dictionary***) Generally speaking, once made, a will should be reviewed every five years or sooner if circumstances change.

A person's will is usually revoked upon marriage, unless the will specifically states that it is being made in contemplation of that particular marriage. It may also lose its effectiveness by the death of persons named as beneficiaries or if the person, while living, disposes of property which had been mentioned in the will. A will can be revoked if it is shown that the person who drew it up was not mentally competent at the time she made the will or if there is evidence of fraud or undue influence.

If you are moving to another province or country, determine if the laws regarding wills there are the same.

where should the will be kept?

The ideal location for the original copy of the will is in a safety deposit box or other fireproof storage with your other important papers. Otherwise, it may not be found when needed, in which event your estate will have been divided under **The Intestate Succession Act,** with no regard for your recorded wishes.

Your lawyer, banker, or executrix may keep a copy of your will in her/his possession. List on each copy where the original is being held. It is important to advise immediate members of your family where the original will is located.

what are the types of wills?

Alberta courts recognize two types of wills, the solemn will and the holograph will.

The solemn will is a written document drawn up by a lawyer which must be signed by the testator (maker) in the presence of two witnesses, and these witnesses must sign in the presence of the testator and each other. The witnesses must not be persons or spouses of persons who will receive anything under the terms of the will and, preferably, should be younger than the testator and easily located.

The holograph will is made wholly by the testator in her own handwriting and signed by her. It needs no witnesses. Some provinces do not recognize holograph wills. A holograph will is not recommended.

Because of the many legal problems involved, a will prepared by a person unfamiliar with the details of the laws relating to wills and the transmission of property may be ineffective in the disposition of the testator's property. For example, a provision that is of uncertain meaning or that may result in property being tied up for an indefinite period may be invalid. In consequence, a will prepared by a person without full knowledge of all the relevant laws is definitely not recommended. A very high proportion of "home-made" wills cause unnecessary delay, uncertainty, and expense.

how the will disposes
of your property

There are several ways to leave assets under a will, and Alberta law applies certain technical rules to the methods you choose.

Here are three examples wherein the deceased's circumstances changed. Because of their failure to revise their wills it is possible that their testamentary intentions will not be realized.

1) Father "A" wants to leave his land to son William, the only child interested in farming. In his will, he directs his executors to rent the land, pay the net income to his wife for her lifetime, and on her death to transfer the land to William. After the will is made, the land is expropriated for a factory site and at Father "A"s death there is no land, only a house in the city and cash in the bank.

   Without a new will to meet the changing conditions, William could possibly get no interest in the former farmlands and the widow could possibly get nothing from the income direction unless the residuary clause benefits William and the widow.

2) My will provides, " I leave my grand piano to my daughter Katherine." This particular wording means that if I own a grand piano at death, my daughter Katherine will receive the grand piano. If I do not own a grand piano at death, Katherine receives nothing.

On the other hand, if my will reads, "I leave a grand piano to my daughter Katherine," then, even if I did not own one at the date of my death, my executors would be obliged to buy a grand piano at the estate's expense and give it to my daughter Katherine.

3) The following example is a case wherein the testator wishes to bequeath a conditional gift:

I wish my son to attend university or agricultural college. To provide an incentive I state in my will, "I leave the sum of $10,000 in trust to my executors to pay the tuition, board, books and other reasonable expenses associated with the education of my son, John, if at my death, or within _____ years thereafter, he attends an Alberta university or agricultural college. At the time of John's graduation, any of the $10,000 which has not been paid toward educational expenses should be paid to John for his own use absolutely. Should John not attend university or an agricultural college within _____ years, or if he does not graduate within _____ plus _____ years, I direct my executors to pay the $10,000, or the amount remaining therefrom, to (an alternative named beneficiary)."

However, if I foolishly refuse to take legal advice and draw up my own will which merely states, " I leave the sum of $10,000 to my son John, trusting that he will use this money to obtain a university degree or finish agricultural college in Alberta, and farm lands which his grandfather homesteaded, etc.," the court could interpret this type of bequest as an absolute gift of $10,000 to son John, with no strings attached, and he would not be obliged to attend university or agricultural college or graduate therefrom.

As these examples illustrate, technical rules of interpretation are necessary to determine unforeseen circumstances. Your lawyer, aware of these rules, can assist you in the proper wording and available alternatives to provide for the probable changes in your particular circumstances.

ownership transfer by will

Transfer of property by will has certain disadvantages, especially when this method is used to transfer the family farm or business to the next generation. These are:

1) Since no one can predict when the transfer of property will take place, the result is a period of uncertainty regarding the transfer, which could extend to thirty or forty years.
2) A will can be changed by the maker at any time, providing the person is still mentally competent, so it is not a definite financial arrangement until made final by death and legal action through the probate court.
3) The legal cost and, often, the tax obligations for the estate will be larger if the will is used to transfer all the property rather than if the farm is sold to the heirs.

what happens
when a person dies without a will?

When a person dies without a will or leaves property that is not disposed of by a will, **The Intestate Succession Act** determines how the estate is to be distributed. Unfortunately, **The Intestate Succession Act,** cannot take into consideration the needs of each particular family and some unfair situations may result.

Effective January 1, 1976, if a person leaves an estate with a net value of less than $40,000, the entire estate goes to the surviving spouse. Where the net value of the estate exceeds this amount, the surviving spouse receives $40,000 plus interest at 5% per annum until paid and the remainder is divided as follows:

1) if one child, half to the surviving spouse and half to the child
2) if more than one child, a third to the surviving spouse and two-thirds divided equally amongst the children.

If a son or daughter is dead but survived by children, they receive what would have been the parent's share.

If there are no children, the surviving spouse receives the entire estate.

If there is no surviving spouse or descendants, the estate goes to the deceased's nearest kin, who are determined in the following order: parents (or the surviving one parent); brothers and sisters in equal shares (or if dead, their children will inherit their share); surviving nephews and nieces; grandparents; aunts and uncles; cousins.

If no heirs survive the deceased person, the estate goes to the Crown in right of Alberta under **The Ultimate Heir Act.**

executrixes and administrators

Executrixes and administrators have three primary duties in handling an estate:

1) to gather all assets of the estate,
2) to pay all legal debts, taxes, and expenses of the estate,
3) to distribute the estate in accordance with the terms of the will, or under provisions of **The Intestate Succession Act,** as the case may be.

An executrix is appointed under a will and has the right to act immediately upon the death of the testator. An administrator may act only when appointed by a court, and this may take months. Delay may be caused by many factors, such as naming the administrator, determining the assets of the estate, posting of a bond, etc. An administrator is required if there is no legally enforceable will or if the executrix named in a will is dead, incapable, or refuses to act.

Careful thought should be given to the selection of an executrix for your estate, and the matter should be discussed with the person you intend to appoint to determine if she agrees to act on your behalf. For example, it is not wise to appoint an executrix who is much older than you are in case she should predecease you. To avoid additional costs of administration, your executrix should be located in Alberta.

You may wish to consider using the services of a trust company or the Public Trustee. Because of their experience in estate planning, they can offer advice which could result in substantial tax savings and avoidance of possible administrative problems. The fees payable to the executrix or administrator are the same, regardless of whether a trust company, the Public Trustee, or an individual is named. They depend on the value of the estate, the complexity, and the time involved in administration.

An executrix or administrator may enter into possession of the estate's property; bring legal action against the debtors of the estate; enforce demands; give effective receipts and discharges; pay the testator's debts and, in effect, perform all directions of the will or **The Intestate Succession Act.** The first step after receiving grant of probate or administration is that of filing income tax and completing succession duty returns, if any.

An executrix may renounce her appointment, providing no steps whatsoever have been taken in the affairs of the estate. This even applies to funeral arrangements. If the executrix lives in Alberta, it is not required that a bond be posted. The alternate executrix then assumes the role of executrix.

Since an administrator is appointed by the court, a bond equal to twice the value of the estate must be posted (unless the court orders otherwise). The persons who may be selected by the court as an administrator are, in order of priority, husband or wife, father or mother, child, brother or sister, uncle or aunt, nephew or niece, other next-of-kin. This priority list is strictly adhered to by the courts, and applicants applying for a grant of administration of an estate must fulfill certain conditions if they wish to vary it. Where there is uncertainty as to the person entitled to a grant of administration, or undue delay exists, the court has the power to grant administration to the Public Trustee or some other appropriate person.

what is the relevant legislation?

We have seen how the **Intestate Succession Act** determines the distribution of an estate in cases where a person dies without a will. There is also additional legislation in Alberta that can affect how an estate is settled.

The Dower Act gives the surviving spouse a life interest in the "homestead" (the land on which the dwelling occupied by the owner is situated) of the deceased person, regardless of the terms of the will or the provisions of **The Intestate Succession Act.** This entitles the spouse to occupy the land (not more than four adjoining lots in one block in a city, town or village, or not more than one quarter section of land) during his or her lifetime, or to rent the land and receive the income. However, the surviving spouse is obligated to pay the taxes and to keep the property in a reasonable state of repair.

Essentially, **The Dower Act** prohibits a married person from selling, giving, or willing away the homestead without the consent of his or her spouse. An order by a judge may be obtained, dispensing with the consent of the spouse to the disposition of the homestead by a married person when:

1) the married person and the spouse are living apart
2) the whereabouts of the spouse is unknown

3) the spouse is mentally incompetent or of unsound mind
4) the married person has two or more homesteads
5) the spouse has not lived in the province since the marriage
6) the spouse has executed an agreement in writing for valuable consideration and in accordance with **The Dower Act**, to release the claim of the spouse to the dower. This agreement may be contained in or form part of a separation agreement and may apply to all homesteads of the married person or only to a described homestead. In order for the agreement to be valid, it must be in writing and must be signed by the spouse releasing the dower rights in the presence of a lawyer (excluding the married partner's lawyer or a partner or employee thereof). The married partner cannot be present when the agreement is being signed.

In order for one spouse to dispose of a homestead, the consent of the other spouse is required, plus an acknowledgement taken separate and apart from the lawyer or spouse who were parties to the original sale. This acknowledgement is evidence that the consent was freely and voluntarily given with knowledge of the rights involved.

A judge may by order dispense with the consent of the spouse if, in the opinion of the judge, it appears fair and reasonable under the circumstances to do so.

If a married person disposes of the homestead without the spouse's consent or obtaining an order by the judge dispensing with the spouse's consent, the married person is liable to the spouse for damages.

In the event of the death of one spouse, the other spouse is entitled to the use of the homestead for the remainder of his or her life.

Under the Family Relief Act, any dependant of the deceased who has not been properly provided for under the terms of the deceased's will, can apply to the Court of Queen's Bench to have the terms of will altered so that proper support can be paid out of the estate.

Those dependants eligible under The Family Relief Act include:

1) the spouse
2) children under eighteen years. In addition to legitimate children born prior to the deceased person's death, the act includes:
   a) a child of the deceased born after the death of the deceased
   b) an illegitimate child whose deceased father has acknowledged the paternity of the child, or has been declared to be the father of the

child by order of **The Maintenance and Recovery Act** or any prior acts providing for affiliation or paternity, or an illegitimate child of a deceased woman

c) children over eighteen years who are unable to support themselves because of mental or physical disability.

No application for assistance under **The Family Relief Act** can be made to the court after six months from the grant of probate of the will or of letters of administration, unless the judge, if he thinks it is just, allows an application to be made after that time.

If a surviving spouse would have been entitled to apply for an order dividing matrimonial property under the Matrimonial Property Act at the time of the testator's death, the application could be continued after the death and result in an alteration of the distribution of the estate.

The rights given under **The Matrimonial Property Act** are in addition to, and not a substitute for, the rights given to a spouse under **The Dower Act**. It also does not affect the rights of a spouse to make an application under **The Family Relief Act.**

For further information on this act, you may obtain a free copy of the pamphlet **Alberta's Matrimonial Property Law** from Alberta Attorney General.

Alberta's **Survivorship Act** must also be considered. When two or more persons die in circumstances rendering it uncertain which survived the other, the younger is presumed to have survived the older. If the wife is younger and she is without a will, she has died intestate. For example, if the husband's property all goes to the wife's estate, it is added to her separate property and passes to her next of kin. This possibility can be eliminated by adding a common disaster clause to a will. Such a clause provides an alternate list of beneficiaries if the spouse does not survive the person who is making up the will by a certain number of days (usually thirty).

Under the Marriage Act, an order may be obtained that presumes a spouse to be dead if:
1) the spouse has been continually absent for seven years
2) no evidence can be found showing that the spouse is alive.

If your spouse is missing, you may be able to apply for a divorce considerably sooner than seven years. A lawyer's advice should be sought in these circumstances as a divorce may well have an effect on an entitlement to benefit from the estate of the missing spouse, whether or not the spouse reappears.

the public trustee

The Public Trustee may, under statute:

a) where no person has been appointed, act as trustee or custodian of the estate of an infant

b) act in the administration of estates

c) act as custodian of property of missing persons, convicts, and deceased persons

d) upon order of the court, act as judicial trustee of the estate of a deceased person

e) either alone or jointly with any other person/s, accept and carry out a trust where he is appointed for that purpose

f) act as a trustee of the estate of an infant made a ward of the province under the provisions of **The Child Welfare Act**

g) act in such other capacity and do such other acts as authorized or required to do by Rules of Court, Order of a Judge or the Lieutenant-Governor-in-Council, or by **The Public Trustee Act**

h) act as the trustee of the estate of a mentally incompetent person

The Public Trustee is entitled to the same costs as are payable to counsel and solicitors and to administration fees either as agreed upon by adult beneficiaries of an estate or as determined by the court upon notice to all concerned.

A barrister and solicitor with at least ten years' standing, the Public Trustee is responsible to the Alberta Attorney General and has offices in Edmonton and Calgary.

Many Albertans who have no relatives or principal beneficiaries resident in the province take advantage of the Public Trustee's professional skills and knowledge and appoint him/her as executor of their wills.

guardians

It is important to realize that there are several kinds of guardians. In Alberta we may, by will, appoint a guardian of the person of our minor children (under eighteen years of age). This guardian is the person you have selected, with his or her consent, to act as a substitute parent. Care should be given to seeing that the new environment will be as close to your present home as possible in religion, discipline, health, and education. (Grandparents should not automatically be appointed as guardians, but it may be advisable to retain the grandparent relationship with the children. Orphaned children will need their grandparents as well as substitute parents.) The courts will approve the selection, as long as the person selected is not deemed by the courts to be an unfit guardian. The second guardian is that of the estate.

Matters relating to the child's separate estate or inheritance are determined by the trustee named in the parent's will (if any), the Public Trustee, or a guardian of the infant's estate appointed by the Surrogate Court or the Court of Queen's Bench after posting a bond.

One of the most important reasons for making a will is to appoint guardians for your minor children. Some of the most heart-rending court cases on record are those where a number of relatives apply for guardianship of the person of the orphaned children. It divides the family (perhaps forever), upsets the children who have already been through a great deal, and costs the estate money through the court costs involved.

The Dependent Adults Act enables the court to appoint a legal guardian and/or a legal trustee for a person who is deemed by a district court judge to be "a Dependent Adult."

Dependent Adults are persons 18 years or older who have been legally judged to be "in need" of a guardian and/or trustee because they are unable to care for themselves and are unable to make reasonable judgments in some or all of the matters relating to themselves.

The court may appoint, as either guardian or trustee, any person 18 years of age or older who consents to act in that capacity. The court must also be satisfied that the person/s will act in the best interests of the Dependent Adult, will not have interests which will conflict with those of the Dependent Adult, is a suitable person to act as the guardian or trustee, and is a resident of Alberta.

Parents or other family members may apply to be appointed as guardians or trustees. In instances where no family members are available or are judged inappropriate for appointment, any interested individual who meets the above criteria may make application to be so appointed.

The Dependent Adults Act was enacted to protect the rights of Dependent Adults. The legal guardian, public or private, must act to encourage the growth and development of the Dependent Adult, and must act in such a way as to protect and ensure the rights of the Dependent Adult. The act also makes similar stipulations for a trustee, public or private.

The Dependent Adult is protected from misuse of authority in two ways:

1) a Guardianship or Trusteeship Order may be reviewed by the court at any time, at the request of the Dependent Adult or any interested person
2) A Guardianship or Trusteeship Order must be reviewed by the court at least every six years.
3) the trustee must pass accounts in the court at least once every two years unless otherwise ordered.

The Public Guardian is a government official with the Department of Social Services, whose duties are legislated under **The Dependent Adults Act**. Where no family member nor private individual will undertake guardianship for a dependent adult, the Public Guardian must apply to the court to become that person's partial or plenary (total) guardian.

It is important not to confuse the Public Guardian with the Public Trustee. The Public Guardian is charged with looking after the personal needs of dependent adults. The Public Trustee is charged with administering the financial affairs of certain minor and adult citizens, as well as the financial affairs of dependent adults under **The Dependent Adults Act.**

CERTIFICATE OF INCAPACITY

When an adult person has been a resident of those facilities specified in the regulations for any period of time, and two physicians are of the opinion that the person is unable to make reasonable judgments with respect to all or any matters regarding his real or personal property ("his estate"), a Certificate of Incapacity may be issued.

One of the signing physicians must then notify the Public Trustee and mail the Certificate of Incapacity to:

1) the Public Trustee
2) the guardian of the person who is the subject of the certificate, or if there is no guardian, the nearest relative living in Canada.

Upon issue of a Certificate of Incapacity, the Public Trustee becomes the trustee of the estate of the Dependent Adult. Certificates of Incapacity are not issued when a Dependent Adult is subject to a Trusteeship Order.

RIGHTS OF THE DEPENDENT ADULT WHEN CERTIFICATE OF INCAPACITY HAS BEEN ISSUED

Upon receipt by the Public Trustee of a Certificate of Incapacity, the Public Trustee shall give a written statement to:

1) the person who is the subject of the certificate
2) the guardian of the person who is the subject of the certificate or, if there is no guardian, the nearest relative living in Canada
3) a statement to the effect that a Certificate of Incapacity has been issued
4) an explanation of the effect of the Certificate of Incapacity
5) a statement as to the right of the person who is the subject of the certificate to an appeal panel for termination of the Certificate of Incapacity.

family choices

Often further grief can follow a death in the family through conflict between surviving relatives over ownership of sentimental objects. Because such items are often of little or no monetary value, they may not have been mentioned in a will.

The following letter illustrates how you and your relatives can work together to determine who will receive particular household furnishing and mementos.

Dear

Several times over the past years I have observed the problems that can arise in families when children are left to divide the personal possessions of deceased parents.

Usually, if there is money and/or property, this is equally distributed amongst the heirs through the directives in the will, with few if any problems.
The items that are of no, or little, significant monetary value frequently cause the biggest hassles. This, of course, is a result of the personal and emotional ties that children normally have toward old family bric-a-brac, furnishings, pictures, ornaments, books, etc., etc., etc.

It saddens me to see rifts between brothers and sisters over the division of these personal goods and I have no wish that any of you should be caught in such an emotional bind. It would grieve me deeply if I felt that some day the "junk" I have collected over the years would be a divisive factor in your future relationships.

For a long time I have been considering a means of settling this concern, and I hope the method I have now evolved will be an expedient one.

What it amounts to is that I plan to draw up a list of what goes to whom in a clearly designated manner.

If in some far away day you are dissatisfied with this division, it will be me rather than each other at whom you can direct your negative feelings. Since I won't be around when that day comes, it won't concern me unduly.

Please don't be alarmed or begin to wonder if I am in ill health or feeble mind. This is in no way the case! As a matter of fact, both your father and I are in excellent health at this point in time and expect to be around accumulating more junk to add to this list in the ensuing years.

It is precisely because I am alert and attuned to life and sensitive to the unpredictableness of the future that I have elected to work out the disposal of my lifetime's accumulation of odds and ends.

Will you then co-operate with me in this by helping me to make the best choices possible for each of you.

The enclosed list designates in part most of the items I can think of that may or may not be of interest to you. I will make my ultimate decisions on the basis of your choices.

I dearly love each of you and I firmly believe that this device may prevent hard-feelings and bitterness between you in some distant day.

You are intelligent and aware individuals and I know you will recognize the realistic practicality of this plan. I hope you will complete and return the enclosed choice list as soon as possible. Whether you do or not, I shall nevertheless carry through with this idea, and a clear-cut directive, designating how things are to be divided, will be completed and placed with my will.

Much love to each of you,

Mother

Please designate and/or describe in the following spaces any items in each category of special importance to you.

PLEASE CHECK ONE

	Not Interested	Interested	Keenly Interested
Family Pictures			
Other Pictures			
Books			
Ornaments			
Dishes and Silver			
Dinner Sets			
Records			
Lamps			
Clocks			
Living Room Furniture			
Dining Room Furniture			
Kitchen Furniture			
Bedroom Furniture			
Antique Items			
Cameras and Projector Equipment			
Crocheted Bedspread			
Lace Tablecloths			
Miscellaneous (any and all other items that are of real or sentimental value to you that I may have missed or overlooked)			

"Family choices," is courtesy of Ethel Marliss, CBC Edmonton commentator.

The following pages may be removed and kept with a copy of your will.

YOUR PERSONAL RECORD & ESTATE GUIDE

NAME

PLACE AND DATE OF BIRTH

PARENTS (full names & birth places)

MARRIAGE (full name of spouse, date and place of ceremony)

CHILDREN (name, place and date of birth)

IMPORTANT NUMBERS

SOCIAL INSURANCE NUMBER

CREDIT CARDS

DRIVER'S LICENSE

CAR REGISTRATION NUMBER

NATURALIZATION PAPERS/PASSPORTS

PENSION CHEQUE

C.P.P. CHEQUE

O.A.S. CHEQUE

OTHER(S)

LOCATION OF IMPORTANT ITEMS

DOCUMENT	LOCATION
SAFETY DEPOSIT BOX(ES)	
KEY TO BOX(ES)	
INSURANCE POLICIES	
WILLS	
REAL ESTATE PAPERS	
LOANS RECEIVABLE	
LOANS PAYABLE	
TITLE CAR	
STOCKS	
BONDS	
CERTIFICATES	
INCOME TAX RECORDS	
PROPERTY TAX RECORDS	
BIRTH CERTIFICATE	
MARRIAGE CERTIFICATE	
SCHOOL RECORDS	
BANK BOOKS	
NATURALIZATION PAPERS/PASSPORTS	
CHARGE PLATES	
AUTO PAPERS	
JEWELLERY	
OTHER(S)	